

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11	WILLIAM JOHN DAUGHTERY, CDCR)	Case No. 08cv0408-WQH (BLM)
12	#F-79985,)	
13	Plaintiff,)	ORDER GRANTING MOTION FOR
14	v.)	LEAVE TO AMEND COMPLAINT AND
15)	DENYING MOTION FOR CONTINUANCE
16	DENNIS WILSON, San Diego Police)	
17	Officer; ESMERALDA TAGABAN, San)	[Doc. No. 18]
18	Diego Police Officer; SERGEANT)	
19	GRIFFIN; DETECTIVE LEMUS,)	
20	Defendants.)	
21	_____)	

On April 30, 2008, Plaintiff, who is proceeding *pro se* and *in forma pauperis* with a Complaint brought pursuant to 42 U.S.C. § 1983, moved for leave to amend his Complaint. Doc. No. 18. In the same motion, Plaintiff also requests that the Court continue certain dates set forth in the Court's April 17, 2008 scheduling order. Id.

The Court issued a briefing schedule for Plaintiff's motion on May 13, 2008. Doc. No. 22. Defendants did not oppose by the deadline set forth in the briefing schedule and the Court took the motion under submission pursuant to Civil Local Rule 7.1(d)(1).

Having reviewed the briefing submitted, and for the reasons set forth below, Plaintiff's motion to amend his Complaint is **GRANTED** and

1 his motion to modify the Court's April 17, 2008 scheduling order is
2 **DENIED.**

3 **FACTUAL AND PROCEDURAL BACKGROUND**

4 In his Complaint, Plaintiff alleges that San Diego Police Officers
5 Wilson and Tagaban used excessive force prior to arresting him in
6 violation of his constitutional rights. Doc. No. 1. He further alleges
7 that San Diego Police Sergeant Griffin and Detective Lemus were
8 "integral participants" in the allegedly unlawful beating because they
9 witnessed it but did nothing to intervene. Id. at 2, 4. Plaintiff sues
10 all four officers in both their individual and official capacities. Id.
11 at 2. He seeks \$635,000.00 in compensatory damages and \$225,000.00 in
12 punitive damages. Id. at 7.

13 Officers Griffin and Tagaban jointly filed an Answer to the
14 Complaint on April 15, 2008. Doc. No. 8. Detective Lemus answered the
15 Complaint on May 27, 2008. Doc. No. 23. It does not appear from the
16 docket that Plaintiff has yet succeeded in serving Defendant Wilson.
17 See Doc. Nos. 7 & 15 (summons twice returned unexecuted).

18 **LEGAL STANDARD**

19 **A. Leave to Amend the Pleadings**

20 Pursuant to Rule 15 of the Federal Rules of Civil Procedure, a
21 party may amend its pleading after the opposing party has served a
22 responsive pleading "only with the opposing party's written consent or
23 the court's leave." Fed. R. Civ. P. 15(a)(2). Upon motion to the
24 court, "[t]he court should freely give leave when justice so requires."
25 Id. "This policy is 'to be applied with extreme liberality.'" Eminence
26 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003)
27 (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712
28 (9th Cir. 2001)).

1 The decision of whether to grant leave to amend nevertheless
2 remains within the discretion of the district court, which may deny
3 leave to amend due to "undue delay, bad faith or dilatory motive on the
4 part of the movant, repeated failure to cure deficiencies by amendments
5 previously allowed, undue prejudice to the opposing party by virtue of
6 allowance of the amendment, [and] futility of amendment." Foman v.
7 Davis, 371 U.S. 178, 182 (1962). In assessing these factors, the
8 consideration of prejudice should carry the greatest weight. Eminence
9 Capital, 316 F.3d at 1052.

10 **B. Modifying the Scheduling Order**

11 Dates set in a scheduling order may be modified "for good cause and
12 with the judge's consent." Fed. R. Civ. P. 16(b)(4); Doc. No. 11
13 (scheduling order stating that dates may be modified for "good cause").
14 The Rule 16 "good cause" standard focuses on the "reasonable diligence"
15 of the moving party. Noyes v. Kelly Services, 488 F.3d 1163, 1174 n.6
16 (9th Cir. 2007); Coleman v. Quaker Oats Company, 232 F.3d 1271, 1294
17 (9th Cir. 2000) (Rule 16(b) scheduling order may be modified for "good
18 cause" based primarily on diligence of moving party). However, a court
19 may also consider the "existence or degree of prejudice to the party
20 opposing the modification." Johnson v. Mammoth Recreations, 975 F.2d
21 604, 609 (9th Cir. 1992).

22 **DISCUSSION**

23 **A. Amending the Complaint**

24 Plaintiff seeks to amend his Complaint to add the San Diego Police
25 Department and the City of San Diego as defendants. Mot. to Amend at 4.
26 Additionally, because Plaintiff alleges that the extent and severity of
27 his physical injuries and the likelihood of long-term effects were not
28 factored into his original damage estimate, Plaintiff seeks to increase

1 his prayer for compensatory damages to \$2.5 million. Id. He also asks
2 the Court's permission to increase the punitive damages request to \$1.5
3 million. Id. As previously noted, Defendants have not opposed
4 Plaintiff's motion.

5 While motions for leave to amend are measured by several factors,
6 prejudice is the "touchstone of the inquiry under Rule 15(a)," and
7 absent prejudice or a strong showing of any of the remaining factors,
8 there exists a presumption in favor of granting leave to amend.
9 Eminence Capital, 316 F.3d at 1052 (citations and quotations omitted).
10 To justify denying leave to amend, prejudice to the non-moving party
11 must be substantial. See e.g. Morongo Band of Mission Indians v. Rose,
12 893 F.2d 1074, 1079 (9th Cir. 1990) (denying leave to amend dismissed
13 complaint two years after original complaint's filing where new claims
14 were legally tenuous and "would have greatly altered the nature of the
15 litigation and required defendants to [undertake] an entirely new course
16 of defense"). Here, Defendants have not opposed or in any way asserted
17 that they would be prejudiced by the proposed amendments. Additionally,
18 it has been less than two months since the Court issued a scheduling
19 order regulating discovery and pretrial proceedings and none of the
20 discovery deadlines have passed (see Doc. No. 11), so Defendants would
21 not be prejudiced as a result of the stage of the proceedings. In fact,
22 Plaintiff filed his motion several weeks in advance of the May 26, 2008
23 deadline this Court set for amending the pleadings.¹ Id. Thus, this
24 Court does not find that Defendants would be unduly prejudiced if
25 Plaintiff is granted leave to amend his Complaint.

26
27 ¹ Because Plaintiff sought leave to amend prior to the deadline for doing so
28 set forth in this Court's order, Rule 16(b)(4) is not implicated in this Court's
analysis of Plaintiff's motion for leave to amend the Complaint.

1 The Court also does not find that any of the other factors weigh
2 against granting Plaintiff leave to amend. His motion was timely filed
3 and there is nothing in the pleadings to suggest bad faith or dilatory
4 motive. See Foman, 371 U.S. at 182. While the bases for Plaintiff's
5 claims against the San Diego Police Department and the City of San Diego
6 are less than clear from his motion, the Court cannot say at this stage
7 that these claims would be futile. Therefore, the Court finds the
8 justice requires that Plaintiff's motion be granted. Fed. R. Civ. P.
9 15(a)(2).

10 **B. Modifying the Scheduling Order**

11 Plaintiff also asks that the deadlines set forth in this Court's
12 April 17, 2008 Case Management Conference Order Regulating Discovery and
13 Other Pretrial Proceedings [Doc. No. 11] ("Scheduling Order") be
14 continued for an unspecified period of time. Mot. to Amend at 1-3.
15 Again, Defendants did not oppose this motion.

16 As previously noted, both this Court's Scheduling Order and Rule 16
17 require a showing of good cause to justify modification of the discovery
18 and pretrial schedule. Plaintiff has set forth nothing more than
19 speculation as to possible problems he may, but has not yet, encountered
20 in complying with the present schedule. Mot. to Amend at 1-3. In fact,
21 Plaintiff has not alleged that he has even begun engaging in the
22 discovery process.² See Noyes, 488 F.3d at 1174 n.6 (moving party must
23 show that he has acted with reasonable diligence in attempting to comply

24
25 ² Plaintiff appears to be under the belief that he need not begin discovery
26 until counsel is appointed. See Mot. to Amend at 1-4. However, this Court has twice
27 denied Plaintiff's requests for appointment of counsel. See Doc. Nos. 14 & 21.
28 Plaintiff is reminded that he is responsible for conducting discovery, responding to
discovery, and complying with all applicable rules, laws and court orders.

1 with the scheduling order). Under the present discovery schedule,
2 Plaintiff still has sufficient time to comply with all of his
3 obligations. Therefore, the Court does not find that Plaintiff has
4 shown good cause to modify the Scheduling Order.

5 **CONCLUSION**

6 For the forgoing reasons, Plaintiff's motion to amend his Complaint
7 is **GRANTED**. On or before **July 1, 2008**, Plaintiff shall file a First
8 Amended Complaint that incorporates the existing Defendants and claims
9 and only the amendments requested in Plaintiff's motion and set forth
10 above. Plaintiff's First Amended Complaint must be complete in and of
11 itself without reference to the prior pleading. See CivLR 15.1.
12 Defendants not named and all claims not re-alleged in the First Amended
13 Complaint will be deemed to have been waived. See King v. Atiyeh, 814
14 F.2d 565, 567 (9th Cir. 1987).

15 Plaintiff's motion to modify the Scheduling Order is **DENIED**. All
16 dates and deadlines remain as previously set.

17 **IT IS SO ORDERED.**

18 DATED: June 5, 2008

19 

20 BARBARA L. MAJOR
21 United States Magistrate Judge

22
23
24
25 COPY TO:

26 HONORABLE WILLIAM Q. HAYES
27 U.S. DISTRICT JUDGE

28 ALL COUNSEL